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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1990

HOPE EVANGELICAL LUTHERAN CHURCH,

Petitioner,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

Petition For Writ Of Certiorari
To the Supreme Court Of Iowa

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May Iowa constitutionally impose an excise tax on a church for the privilege of using tangible personal property in the conduct of its religious services?

2. May Iowa constitutionally impose an excise tax on a church for the privilege of using (reading) Bibles and other written materials?

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PETITION FOR WRIT OF CERTIORARI

Petitioner petitions this court for a writ of certiorari to the Supreme Court of Iowa and states:

REFERENCE TO OFFICIAL REPORT

An opinion was delivered in this case by the Supreme Court of Iowa, and that opinion is reported at 463 N.W.2d 76 (Iowa, 1990).

JURISDICTIONAL STATEMENT

The opinion sought to be reviewed was filed in the Supreme Court of Iowa on November 21, 1990. This court has jurisdiction to review that opinion by writ of certiorari pursuant to 28 U.S.C. Section 1257(a) for the reason that petitioner in the courts below claimed rights, privileges and immunities under the First and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the Constitution of the United States provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."

The Fourteenth Amendment to the Constitution of the United States provides, in part, that "No state shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Iowa Code Section 423.2 states, in part: "An excise tax is imposed on the use in this state of tangible personal property purchased for use in this state, at the rate of four percent of the purchase price of the property. The excise tax is imposed upon every person using the property within this state until the tax has been paid directly to the county treasurer or the state department of transportation, to a retailer, or to the department."

Iowa Code Section 423.14 states, in part: "Any person who uses any property . . . upon which the tax herein imposed has not been paid . . . shall be liable therefor, and shall on or before the last day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by the person during the preceding quarterly period in such manner and accompanied by such returns as the director shall prescribe."

STATEMENT OF THE CASE

Petitioner (the Church) seeks review of a decision by the Supreme Court of Iowa affirming a consumer use tax assessment against the Church, which assessment the Church had protested.

During 1983 an auditor for the Iowa Department of Revenue and Finance (the Department) appeared at the church during a time when the Church's pastor was on vacation and for 2 1/2 days conducted an audit of the Church's records, requesting all bills starting with the year 1977. The field audit resulted in a notice of assessment dated December 19, 1983, which the Church protested with a protest received by the Department on January 18, 1984. An evidentiary hearing was held before a hearing officer for the Department on February 3, 1987, resulting in a proposed order issued on May 31, 1988, which was adopted by the Department's director in his order upon review issued on August 31, 1988. That order was affirmed by the district court on August 3, 1989, and by the Supreme Court of Iowa on November 21, 1990.

Iowa's use tax is an excise tax imposed upon consumers for the use of tangible personal property. Iowa Code Section 423.2. The Department is demanding payment of the excise tax for the Church's use of tangible personal property, and the Church is protesting claiming that (i) an excise tax for using tangible personal property in its religious services violates its right to the free exercise of religion, and (ii) an excise tax for using (reading) written materials violates its right to freedom of the press, both of which rights are guaranteed by the Constitution of the United States.

FEDERAL QUESTIONS WERE TIMELY AND PROPERLY RAISED

The federal questions sought to be reviewed were first raised in the Church's protest received by the

Department on January 18, 1984. A copy of that protest is included in the appendix to this petition. In the proposed order of the hearing officer issued on May 31, 1988, which proposed order was adopted by the director of the Department by order issued on August 31, 1988, the hearing officer concluded that the Church did not meet its burden to show that the assessment was unconstitutional on the bases that the use tax has chilling effects on the free exercise of religion and freedom of the press. Copies of the proposed order and the order of director upon review are included in the appendix.

The Church petitioned the Iowa District Court for Linn County for judicial review of the order of the director issued on August 31, 1988, and the district court filed a ruling on August 3, 1989, affirming the decision of the director. A copy of the ruling on petition for judicial review is included in the appendix.

Upon appeal, the Supreme Court of Iowa concluded that the assessment and required payment of Iowa's generally applicable consumer use tax imposed no constitutionally significant burden on the Church's religious practices or beliefs and that the free exercise clause did not require Iowa to grant the Church an exemption from its generally applicable use tax. The Supreme Court of Iowa further agreed with the Department that the Church had not been denied its constitutional rights under the freedom of press clause. A copy of the decision of the Supreme Court of Iowa filed on November 21, 1990, is included in the appendix.

ARGUMENT

Iowa's use tax is an excise tax imposed on the use in Iowa of tangible personal property purchased for use in Iowa. The excise tax is imposed upon the consumer, and the consumer is responsible to report and pay the tax. Iowa Code Sections 423.2 and 423.14. It is illegal for a church to use tangible personal property in Iowa unless the excise tax is paid. Iowa's use tax is akin to a license tax for the privilege of using tangible personal property, and, when applied to the use of tangible personal property by a church in a religious context, the tax runs afoul of the First Amendment's proscriptions.

In this case the Department has taken the position that the Church cannot use Bibles, books, hymnals, candles and other tangible personal property in the conduct of its religious services without paying an excise tax for the privilege of doing so. In the decision of the Supreme Court of Iowa, Justice Snell stated (463 N.W.2d 76, 78) [Appendix p. A-4]:

> "In testimony before the hearing officer, the department clearly enunciated its position that the tax was imposed on items used by the church including Bibles. David Casey, manager of the audit services section of the revenue department, testified as follows:
>
> *Casey*: The State is imposing the tax on the use of the Bibles.
>
> *Fatka* (attorney for Hope): And your feeling is that one of the uses of the Bible is reading the Bible?
>
> *Casey*: My personal feeling is that, yes.
>
> *Fatka*: Therefore in order for the church to read the Bible they have to pay the Iowa tax?

> *Casey*: In order for the church to use the Bible they have to pay the Iowa tax."

This court has recently considered a similar case, *Jimmy Swaggart Ministries vs. Board of Equalization*, ___ U.S. ___, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990). In *Jimmy Swaggart Ministries* this court held that California's imposition of sales and use tax liability on the sale of religious materials did not contravene the Religion Clauses of the First Amendment and that the collection and payment of the tax imposed no constitutionally significant burden on religious practices or beliefs under the Free Exercise Clause. In *Jimmy Swaggart Ministries* this court distinguished its holdings in *Murdock vs. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943) and *Follett vs. McCormick*, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944) which had held that flat license taxes on commercial sales were unconstitutional with regard to the evangelical distribution of religious materials.

The instant case differs from *Jimmy Swaggart Ministries*. California's tax is assessed against the retailer, whereas Iowa's tax is assessed against the consumer. Although Iowa's tax is not imposed as a precondition of disseminating the Church's message, it is imposed as a precondition of using tangible personal property in religious services and thus acts as a prior restraint on the exercise of religious liberty.

Jimmy Swaggart Ministries could avoid the California tax by ceasing sales in California. The Church in the instant case can only avoid the Iowa tax by ceasing to use Bibles, candles, crosses and other items of tangible personal property in its religious services.

Since Iowa's use tax applies directly on the Church as a consumer, the tax requires detailed monitoring and close administrative contact between Iowa and the Church. This is evidenced by the fact that the audit giving rise to the assessment in the instant case lasted for two and one-half days during which the auditor was required to review all bills for all items of tangible personal property purchased by the Church over the period of several years.

Although one complements the other, there is a substantial difference between a use tax and a sales tax. A sales tax is normally imposed upon the gross receipts from sales of tangible personal property (and services) and is collected from and by the retailer. On the other hand, Iowa's use tax is an excise tax imposed upon the "use" of tangible personal property and is collected from the consumer. Thus it is illegal for church members to read the Bible or any other written documents or to use crosses, candles or other tangible personal property in worship services unless the excise tax is paid.

The fact that Iowa's use tax is of general application should not relieve it from attack. As Justice Douglas wrote in *Murdock* (319 U.S. 105, 115): "A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Whether a state may impose an excise tax on a church for the privilege of using tangible personal property in the conduct of its religious services and whether a state may impose an excise tax on a church (or on any other citizen) for the privilege of using (reading) Bibles and other written materials without running afoul of the First Amendment proscriptions are important questions of federal law which have not, but should be, settled by this Court. The Supreme Court of Iowa has concluded that Iowa may impose such an excise tax. This Court should review that decision and reverse that decision.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 269/89-1300

Filed November 21, 1990

HOPE EVANGELICAL LUTHERAN CHURCH,

Appellant,

vs.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Appellee.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Church appeals a use tax assessment upon consumer items it purchased from out-of-state, church-affiliated suppliers. AFFIRMED.

Gerald L. Fatka of Lynch, Dallas, Smith & Harman, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Harry M. Griger, Special Assistant Attorney General, and Lucille M. Hardy, Assistant Attorney General, for appellee.

Considered by McGiverin, C.J., and Lavorato, Neuman, Snell, and Andreasen, JJ.

SNELL, J.

Appellant, Hope Evangelical Lutheran Church (Hope), appeals from an adverse ruling of the district court. The district court affirmed the decision of the Iowa Department of Revenue and Finance (department), holding that the consumer use tax assessed against Hope is

not in violation of the free exercise clauses of the United States and Iowa Constitutions; that the court is precluded from considering the issue of excessive governmental entanglement since Hope did not raise that issue before the department; that the use tax does not violate the freedom of the press provisions of the first amendment to the United States and Iowa Constitutions; that Hope fails to qualify for a use tax exemption under Iowa Code sections 422.45(3) and 423.4(4) (1977) because it did not show that its suppliers' gross receipts are derived from the sale of educational, religious, or charitable activities and that the entire proceeds therefrom are expended for educational, religious, or charitable purposes; and that Hope is not exempt from the use tax under Iowa Code sections 422.45(8) and 423.4(4) (1977) since it does not qualify as a private nonprofit educational institution as defined in 701 Iowa Administrative Code section 17.11. We affirm.

I. Background Facts and Proceedings.

Hope Evangelical Lutheran Church, located in Cedar Rapids, Iowa, was assessed a consumer use tax for the period beginning October 1, 1978, and ending June 30, 1983, for consumer items it purchased from out-of-state, church-affiliated suppliers. The amount in controversy at the time of the assessment was $762.31, which includes tax, interest and fees. The department has waived any penalties that may apply.

On December 19, 1983, the department issued a notice of assessment relating to Hope's alleged consumer use tax liability for the period October 1978 through June

1983. This assessment reflects the department's determination, based upon its two-and-one-half day field audit of the church, that a consumer use tax was due from Hope by reason of Hope's purchase of items for consumption or use from its out-of-state, church-affiliated suppliers for in-state use.

The tax portion of the assessment is based on Hope's use of a wide variety of consumer items, including: an oven, garbage bags, adhesive, lights, books, furnace filters, cleaners, supplies, salt, candles, wire, paint primer, paint supplies, battery, folding partition, cards, bulletins, towels, certificates, paper, cloth, publications, envelopes, home altars, credit memos, subscriptions, candle lighter, stencils, book capers, flower chart card, hood kit, coin collection, exam kit, forms, printing, roll kit, cradle roll, crosses, anniversary directories, lawn mower, pins, hymnal companion, word and witnesses materials and similar items, the majority of which were purchased from Fortress Church Supply Stores, Augsburg Publishing House and Concordia Publishing House. Hope filed a timely protest to the assessment with a hearing officer of the department on January 18, 1984.

On February 3, 1987, a hearing was held before a hearing officer. At the hearing Hope claimed exception from the use tax on the grounds that most of the items taxed were used for educational or religious purposes. Twelve items were conceded by Hope to be taxable because they were not used by the church for either worship purposes or educational purposes. These included lawn mowers, snowblowers, garbage bags, keys, batteries, paints, reupholstering, furnace filter, screws, anchors, belts and cleaners.

In testimony before the hearing officer, the department clearly enunciated its position that the tax was imposed on items used by the church including Bibles. David Casey, manager of the audit services section of the revenue department, testified as follows:

> *Casey*: The State is imposing the tax on the use of the Bibles.
>
> *Fatka* (attorney for Hope): And your feeling is that one of the uses of the Bible is reading the Bible?
>
> *Casey*: My personal feeling is that, yes.
>
> *Fatka*: Therefore in order for the Church to read the Bible they have to pay the Iowa tax?
>
> *Casey*: In order for the church to use the Bible they have to pay the Iowa tax.

In a proposed order, issued May 31, 1988, the hearing officer upheld the department's assessment for consumer use tax due. On June 20, 1988, Hope appealed the proposed order to the director of the department. The director affirmed the proposed order and adopted it in its entirety. Thereafter, on September 21, 1988, Hope filed a timely petition for judicial review of the director's order with the clerk of the district court for Linn County. The matter was then submitted to the Iowa District Court for Linn County on May 4, 1989, on the record made before the hearing officer, written briefs, and oral arguments. The district court issued its ruling on August 3, 1989, holding adversely to Hope and Hope appeals.

II. Scope of Review.

This court may review the decision of the district court pursuant to Iowa Code section 17A.20 (1989) (administrative procedure act), which provides that:

> An aggrieved or adversely affected party to the judicial review proceeding may obtain a review of any final judgment of the district court under this chapter by appeal. The appeal shall be taken as in other civil cases, although the appeal may be taken regardless of the amount involved.

Furthermore, pursuant to Iowa Code section 17A.19(8) (1989):

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:
>
> *a.* In violation of constitutional or statutory provisions;
>
> *b.* In excess of the statutory authority of the agency;
>
> . . . .
>
> *e.* Affected by other error of law;
>
> . . . .
>
> *g.* Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.

Our scope of review is at law, not de novo, therefore we are limited to those issues considered in the record

made before the department. *Board of Dental Examiners v. Hufford*, ___ N.W.2d ___, ___ (Iowa 1990); *Hearst Corp. v. Iowa Dep't of Revenue and Fin.*, ___ N.W.2d ___, ___ (Iowa 1990); *Hussein v. Tama Meat Packing Corp.*, 394 N.W.2d 340, 341 (Iowa 1986). Iowa Code section 17A.19 (1989) limits a district court's review to a determination of whether the agency committed any errors of law specified in subsection 8 of that section. To determine whether the district court properly exercised its power of judicial review, "this court applies the standards of section 17A.19(8) to the agency action to determine whether the court's conclusions are the same as those of the district court. If the conclusions are the same, affirmance is in order." *Jackson County Pub. Hosp. v. Public Employment Relations Bd.*, 280 N.W.2d 426, 429-30 (Iowa 1979). Therefore, "if we find that the agency's findings are supported by substantial evidence, we are bound by those findings." *Hufford*, ___ N.W.2d at ___.

III. Constitutional Challenges.

At the outset we must recognize a presumption favoring the constitutionality of our state's taxing statutes. *Hearst Corp.*, ___ N.W.2d at ___. The rule is well settled in this court that a statute will not be declared unconstitutional unless it clearly, palpably and without doubt infringes the constitution. *Id.; Zilm v. Zoning Bd. of Adjustment*, 150 N.W.2d 606, 609 (Iowa 1967). Moreover, a taxing statute will not be declared unconstitutional unless it is so clearly and plainly in contravention of the constitutional limitations and its guarantees as to leave no reasonable doubt as to its unconstitutionality. *See Vilas v. Board of Assessment and Review*, 223 Iowa 604, 607, 273

N.W. 338, 339-40, *appeal dismissed*, ___ U.S. ___ (1937). We have also said in various ways that every reasonable doubt must be resolved in favor of the constitutionality of a taxing statute. *See City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977); *Hansen v. Haugh*, 149 N.W.2d 169, 174 (Iowa 1967).

Appellant Hope contends, however, that the assessment of the tax and the tax itself is barred by the first and fourteenth amendments to the Constitution of the United States and by the Constitution of Iowa.

A. Free Exercise of Religion.

Hope's central contention is that the department's assessment of a consumer use tax on the church's use of the aforementioned consumer items contravenes first amendment strictures, made applicable to the several states by the fourteenth amendment, to "make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . . " U.S. Const. amend. I. The Constitution of the State of Iowa similarly provides in stating that:

> The General Assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.

Iowa Const. Art. I, § 3.

The United States Supreme Court has stated:

> The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, ___, 90 S. Ct. 1409, 1411-12, 25 L. Ed. 2d 697, ___ (1970).

The Court has also stated that the free exercise clause "withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority." *Abington School Dist. v. Schempp*, 374 U.S. 203, 222-23, 83 S. Ct. 1560, 1571-72, ___ L. Ed. 2d ___, ___ (1963). In fact, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 220, 92 S. Ct. 1526, 1536, ___ L. Ed. 2d ___, ___ (1972) (citations omitted). Furthermore, the Supreme Court has established that "[t]he free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. ___, ___, 109 S. Ct. 2136, 2148, ___ L. Ed. 2d ___, ___ (1989) (citations omitted).

Recently, the Court examined the free exercise clause in relation to an Oregon criminal statute as applied to the use of Peyote in a religious rite. Examples of first amendment violations were given. "The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div., Dep't of Human Resources v. Smith*, ___ U.S. ___, ___, 110 S. Ct. 1595, 1599, ___ L. Ed. 2d ___, ___ (1990) (citations omitted).

Hope relies almost exclusively on the Supreme Court's decisions in *Follett v. Town of McCormick*, 321 U.S. 573, 64 S. Ct. 717, 88 L. Ed. 938 (1944); *Jones v. City of Opelika*, 319 U.S. 103, 63 S. Ct. 890, 87 L. Ed. 1290 (1943); and *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943), for the proposition that a state may not impose a sales or use tax on consumer items purchased by a church to be used or employed in connection with religious activities. Hope argues that the department's assessment of the use tax burdens its free exercise of religion in a manner analogous to that in which the Evangelists in *Follett, Jones* and *Murdock* were burdened.

In a similar case, *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 110 S. Ct. 688, ___ L. Ed. 2d ___ (1990), the Court rejected expansive readings of *Follett, Jones* and *Murdock* as contrary to the decisions themselves. In both *Jones* and *Murdock*, the Court considered the constitutionality of a city ordinance requiring all persons canvassing or soliciting within the city to procure a license by paying a flat fee. In reversing the convictions

of the Jehovah's Witnesses convicted under the ordinances for soliciting and distributing religious literature without a license, the Court explained that:

> The hand distribution of religious tracts is an age-old form of missionary evangelism – as old as the history of printing presses. It has been a potent force in various religious movements down through the years. This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith. It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

Murdock, 319 U.S. at 108-09, 63 S. Ct. at 872-73, 87 L. Ed. at ___ (footnotes omitted). Accordingly, the Supreme Court held that "spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types." *Id.* at 110, 63 S. Ct. at 873, 87 L. Ed. at ___; *see also Martin v. Struthers*, 319 U.S 141, 63 S. Ct. 862, 87 L. Ed. 2d 1313 (1943).

The Court's decisions in these cases resulted from the particular nature of the challenged taxes, that is, flat license taxes that operated as a prior restraint on the exercise of religious liberty. The Court emphasized that the tax at issue was "a license tax – a flat tax imposed on the exercise of a privilege granted by the Bill of Rights,"

Murdock, 319 U.S. at 113, 63 S. Ct. at 875, 87 L. Ed. at ___, and cautioned that they did "not mean to say that religious groups . . . are free from all financial burdens of government." *Grosjean v. American Press Co.*, 297 U.S. 233, 250, 56 S. Ct. 444, 449, 80 L. Ed. 660, ___ (1936). The Court also stated that while it is one thing to impose a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities, it is quite another thing to exact a tax for the privilege of delivering a sermon. *Murdock*, 319 U.S. at 112, 63 S. Ct. at 874, 87 L. Ed. at ___. In *Follett*, the Court reiterated that a preacher is not free from all financial burdens of government, including taxes on income or property and, like other citizens, may be subject to general taxation. *Id.*, 321 U.S. at 578, 64 S. Ct. at 719, 88 L. Ed. at ___. The thrust of these cases is analyzed in *Jimmy Swaggart Ministries* as follows:

> Significantly, we noted in both [*Murdock* and *Follett*] that a primary vice of the ordinances at issue was that they operated as prior restraints of constitutionally protected conduct:
>
> > "In all of these cases [in which license taxes have been invalidated] the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the first amendment. Accordingly, *it restrains in advance*

> *those constitutional liberties of press and religion and inevitably tends to suppress their exercise.* That is almost uniformly recognized as the inherent vice and evil of this flat license tax."
>
> . . . Our concern in *Murdock* and *Follett* – that a flat license tax would act as a *precondition* to the free exercise of religious beliefs – is simply not present where a tax applies to all sales and uses of tangible personal property in the State.
>
> . . . .
>
> . . . California's generally applicable sales and use tax is not a flat tax, represents only a small fraction of any retail sale, and applies neutrally to all retail sales of tangible personal property made in California. California imposes its sales and use tax even if the seller or the purchaser is charitable, religious, nonprofit, or state or local governmental in nature. Thus, the sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs *per se*; rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. For example, California treats the sale of a bible by a religious organization just as it would treat the sale of a bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase. There is no danger that appellant's religious activity is being singled out for special and burdensome treatment.

Id., ___ U.S. at ___, 110 S. Ct. at 694-96, ___ L. Ed. at ___ (citations omitted).

In addition, this court notes that the appellant's free exercise claim is also in significant tension with the Supreme Court's decision last term in *Hernandez*, 490 U.S. at ___, 109 S. Ct. at 2148-49, 104 L. Ed. 2d at ___ (1989), in which the Court held that the government's disallowance of a tax deduction for religious "auditing" and "training" services did not violate the free exercise clause. The Court in *Hernandez* reasoned that:

> Any burden imposed on auditing or training therefore derives solely from the fact that, as a result of the deduction denial, adherents have less money to gain access to such sessions. This burden is no different from that imposed by any public tax or fee; indeed, the burden imposed by the denial of the "contribution or gift" deduction would seem to pale by comparison to the overall federal income tax burden on an adherent.

Id. at ___, 109 S. Ct. at 2149, 104 L. Ed. 2d at ___.

There is no evidence in this case that the payment of the consumer use tax violates Hope's sincere religious beliefs. Iowa's nondiscriminatory sales and use tax law requires only that the taxpayer remit to the state the use tax due on consumer items it purchases from its out-of-state, church-affiliated suppliers for its in-state use. The only burdens on Hope in this case are a slight reduction of funds available to it for the purchase of consumer items and the costs associated with administering this generally-applicable tax. The Court has made it clear that to the extent that imposition of a generally-applicable tax merely decreases the amount of money a taxpayer has to spend on its religious activities, any such burden is not constitutionally significant. *See Jimmy Swaggart Ministries,*

___ U.S. at ___, 110 S. Ct. at 696, ___ L. Ed. 2d at ___; *Hernandez*, 490 U.S. at ___, 109 S. Ct. at 2149, 104 L. Ed. 2d at ___; *See also Texas Monthly, Inc. v. Bullock*, 489 U.S. ___, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989) (plurality opinion). Though we do not doubt the economic cost to Hope of complying with a generally-applicable sales and use tax, compliance with such a tax is no different from compliance with other generally-applicable laws and regulations, such as health and safety-regulations, to which the taxpayer must adhere.

We conclude, therefore, that the assessment and required payment of the generally-applicable consumer use tax in this case imposes no constitutionally significant burden on appellant's religious practices or beliefs. The free exercise clause accordingly does not require this state to grant the appellant an exemption from its generally-applicable sales and use tax.

B. Freedom from Excessive Governmental Entanglement.

Hope also contends that application of the consumer use tax to its use of personal property violates the establishment clause of the United States and Iowa Constitutions because it fosters an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613, 91 S. Ct. 2105, 2111, 29 L. Ed. 2d 745, ___ (1971).

The district court found, as do we, that this contention was not raised or argued before the department's hearing officer. Since there is no establishment clause evidence in the record, this court will not consider those arguments now. *Kartridg Pak Co. v. Department of Revenue*,

362 N.W.2d 557, 561 (Iowa 1985). We note, however, that the California sales and use tax reviewed in *Jimmy Swaggert Ministries* involved no excessive entanglement between government and religion. The Court there said:

> The fact that appellant must bear the cost of collecting and remitting a generally applicable sales and use tax – even if the financial burden of such costs may vary from religion to religion – does not enmesh government in religious affairs. Contrary to appellant's contentions, the statutory scheme requires neither the involvement of state employees in, nor on-site continuing inspection of, appellant's day-to-day operations. There is no "official and continuing surveillance" by government auditors. The sorts of government entanglement that we have found to violate the Establishment clause have been far more invasive than the level of contact created by the administration of neutral laws.

Id., ___ U.S. at ___, 110 S. Ct. at 699, ___ L. Ed. 2d at ___ (citations omitted).

C. Freedom of the Press.

The first amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . " U.S. Const. amend. I. Section 7 of article I of the Iowa Constitution similarly provides. The language of the first amendment clearly does not prohibit all regulation of the press. *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983). In fact, it is beyond dispute that some publications may be subjected to generally-applicable

economic regulations by the state and the federal government without creating constitutional problems. *Id.* at 581, 103 S. Ct. at 1369, 75 L. Ed. 2d at ___. Problems arise, however, when a "discriminatory tax on the press burdens rights protected by the first amendment." *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227, 107 S. Ct. 1722, 1726, 95 L. Ed. 2d 209, ___ (1987) (footnote omitted).

It is Hope's contention that Iowa's imposition of an excise tax on the use of Bibles, books and other written materials has a chilling effect on the church's right to freedom of the press. We find otherwise.

This Court recently held in *Hearst Corp.* that the Iowa structure does not create a special tax that applies only to certain publications protected by the first amendment nor is it tailored in such a way that it singles out and targets small groups of publications. *Id.* at ___. Iowa's tax is a generally-applicable retail sales tax whereby gross receipts from retail sales of tangible personal property are taxed. *See* Iowa Code § 422.43 (1977). In addition, to reach those retail sales that cannot be subjected to state sales tax, Iowa imposes a complementary generally-applicable retail use tax whereby the use in Iowa of tangible personal property is taxed. *See* Iowa Code § 423.4 (1977); *Dain Mfg. v. Iowa State Tax Comm'n*, 237 Iowa 531, 534, 22 N.W.2d 786, 788 (1946). Thus, while there are a number of sales and use tax exemptions in Iowa, *see generally* Iowa Code § 422.43 (1977), most retail transactions involving tangible personal property for use or consumption in the State of Iowa are taxed. *See Lee Enters., Inc. v. Iowa State Tax Comm'n*, 162 N.W.2d 730, 754-55 (Iowa 1969) (holding that Iowa sales and use tax law, as amended, is of general

application). The only deviation from this general scheme of taxation is that newspapers and free shoppers guides are granted an exemption from the tax, while other publications are not. Since the tax does not target any small groups of publishers, either directly or indirectly, the tax satisfies the standards set by the Supreme Court in *Minneapolis Star. Hearst Corp.*, ___ N.W.2d at ___.

In reference to its decision in *Minneapolis Star*, the Court stated in *Jimmy Swaggart Ministries* that "[i]ndeed, our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Id.*, ___ U.S. at ___, 110 S. Ct. at 695, ___ L. Ed. 2d at ___ (quoting *Minneapolis Star*, 460 U.S. at 587 n.9, 103 S. Ct. at 1373 n.9, 75 L. Ed. 2d at ___ n.9 (citations omitted)).

A comparison of first amendment rights concerning religion and the press was made this year by the Court in *Smith* as follows:

> It is no more necessary to regard the collection of general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.

Id., ___ U.S. at ___, 110 S. Ct. at 1599-1600, ___ L. Ed. 2d at ___ (citations omitted).

Hope has failed to cite any authority in support of its proposition that Iowa's consumer use tax has a chilling effect on a church's right to freedom of the press. We agree with the department that Hope has not been denied any of its constitutional rights under the freedom of speech and press clauses to the United States and Iowa Constitutions.

IV. Use Tax Exemptions Under the Code.

701 Iowa Administrative Code section 17.1(4) states in relevant part that:

> *a.* There is no authority in the Iowa Code to grant a nonprofit corporation any type of blanket sales or use tax exemption on its purchases because the organization is exempted from federal or state income taxes.
>
> . . . .
>
> *c.* Nonprofit corporations and educational, religious, or charitable organizations can be held responsible for the payment of sales and use taxes as would any other individual, retailer, or corporation.

Therefore, all nonprofit organizations not specifically exempted from the payment of sales or use tax based solely on the nature of their organization can be held accountable for the payment of such a tax on their purchases as would any other individual, retailer, or corporation unless the purchases fall directly under a specific

exemption statute. Hope contends that Iowa Code sections 422.45(3), 422.45(8) and 423.4(4) (1977) grant it such an exemption.

Iowa Code section 422.45 (1977) provides in part that:

> There are hereby specifically exempted from the provisions of this division and from the computation of the amount of tax imposed by it, the following:
>
> . . . .
>
> 3. The gross receipts from sales of educational, religious, or charitable activities, where the entire proceeds therefrom are expended for educational, religious, or charitable purposes, ...
>
> . . . .
>
> 8. The gross receipts of all sales of goods, wares, or merchandise, or services, used for educational purposes to any private nonprofit educational institution in this state . . . .

Likewise, the "use" of such tangible personal property is exempt from Iowa use tax by virtue of Iowa Code section 423.4(4) (1977), which also provides in part that:

> The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this chapter:
>
> . . . .
>
> 4. Tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of section 422.45 . . . .

When interpreting statutes, we are guided by familiar principles of statutory construction. Of course, the

polestar is legislative intent. *Iowa Dep't of Revenue v. Iowa Merit Employment Comm'n*, 423 N.W.2d 610, 614 (Iowa 1976). Our goal then, is to ascertain that intent and, if possible, give it effect. *Isaacson v. Iowa State Tax Comm'n*, 183 N.W.2d 693, 695 (Iowa 1971). To ascertain the intent of the legislature, we look to what it said, rather than what it should or might have said. *State v. Hesford*, 242 N.W.2d 256, 258 (Iowa 1976). Words are given their ordinary meaning unless defined differently by the legislature or possessed of a particular and appropriate meaning in law. *Id.* However, we must avoid legislating in our own right and placing upon statutory language a strained, impractical or absurd construction. *Doe v. Ray*, 251 N.W.2d 496, 501 (Iowa 1977).

Administrative rules have the force of law and are presumed valid. *Richards v. Iowa Dep't of Revenue*, 360 N.W.2d 830, 833 (Iowa 1985). Weight should be given to the department's interpretation of the statutes, particularly when they are of long standing, but this court is not bound by that interpretation. *Sommers v. Iowa Civil Rights Comm'n*, 337 N.W.2d 470, 473 (Iowa 1983). Moreover, we must strictly construe exemption statutes and any doubts must be resolved against the exemption and in favor of taxation. *American College Testing Program, Inc. v. Forst*, 182 N.W.2d 826, 827 (Iowa 1970).

A. The Section 422.45(3) Exemption.

Tangible personal property is exempt from Iowa use tax where the entire proceeds from sales of educational, religious, or charitable activities are expended for educational, religious, or charitable purposes. *See* Iowa Code

§§ 422.45(3), 423.4(4) (1977). The Iowa Administrative Code lists criteria to test whether activities are educational, religious, or charitable, *see* 701 Iowa Admin. Code §§ 17.1(1)(a)-(c), and whether the entire proceeds are expended for such purposes. *See* 701 Iowa Admin. Code § 17.1(2).

Hope contends that the department erred in assessing a use tax against the church for items purchased by it from Fortress Church Supply Stores, Augsburg Publishing House, Concordia Publishing House, The Lutheran Magazine and The Lutheran Church in America because the entire proceeds from their sale of educational, religious, or charitable activities are expended for educational, religious, or charitable purposes. The claim is that because the sellers of the items sought to be taxed are not-for-profit corporations that use their profits for religious activities, they come within the parameters of the sales tax statutory exemption and perforce include Hope within the use tax exemption. Our review shows that Hope has not supported its proposition with legal authority and has also failed to provide sufficient factual data to prove its underlying premise. The only evidence offered by Hope in support of its position is the testimony of its pastor and three affidavits from officials of Hope's major suppliers.

Hope did not meet its burden of proof in establishing its right to an exemption from Iowa's use tax under Iowa Code sections 422.4(3) and 423.4(4) (1977). Pursuant to these Code sections and 701 Iowa Administrative Code sections 17.1(1) and (2), Hope must show that the organizations' activities are educational, religious, or charitable, and that the entire proceeds therefrom are in fact

expended for such purposes. The evidence in this regard does not show how Hope has met these standards. Affidavits which merely state conclusions with no supporting documents or records cannot sustain Hope's burden. Additionally, even if the gross receipts of these suppliers could be considered to be from the sale of educational, religious, or charitable activities, the department was correct in holding that Hope did not meet its burden to establish the right to a use tax exemption under Iowa Code sections 422.45(3) and 423.4(4) (1977), since it failed to show with particularity how the entire proceeds were expended by its suppliers.

B. The Section 422.45(8) Exemption.

Tangible personal property used for educational purposes by a private Iowa nonprofit educational institution is exempt from the state's use tax. *See* Iowa Code §§ 422.45(8), 423.4(4) (1977). Iowa Code section 422.45(8) (1977) provides an exemption for the gross receipts of all sales of goods, wares, or merchandise, or services, used for educational purposes to any private nonprofit educational institution in Iowa. A "private nonprofit educational institution" is defined in 701 Iowa Administrative Code section 17.11 as follows:

> [A] school, college, or university with students, faculty, and an established curriculum, a group of qualifying organizations acting in concert, or libraries.

See also American College Testing Program, 182 N.W.2d at 827.

Hope contends that it meets this definition of a private nonprofit educational institution because it has students, faculty, and an established curriculum. The department, on the other hand, contends that Hope provides religious instruction as a normal consequence of being a religious organization and does not qualify as a private nonprofit educational institution for purposes of the Iowa Code section 422.45(8) (1977) use tax exemption.

We cannot construe the exemption strictly and include Hope within the term "educational institution." To do so would place a strained, impractical or absurd construction upon the statute in contravention to our own principles of statutory construction. *Doe*, 251 N.W.2d at 501.

Hope cites our case of *Community Drama Association v. Iowa State Tax Commission*, 252 Iowa 854, 862, 109 N.W.2d 23, 28 (1961), in support of its proposition that many jurisdictions have accepted a broad meaning of the term "educational institution." In *Community Drama*, this court held that a community theater was engaged in educational activities which qualified for an exemption from sales tax. *Id.* We noted, however, that the determination of what are "educational activities" is a factual problem not amenable to an all-inclusive rule. *Id.*

There is a distinction between being engaged in educational activities for educational purposes and educational institutions. Concededly Hope's activities are somewhat related to an educational process, but this fact alone does not qualify it as an "educational institution."

The evidence in this case does not show that Hope qualifies as an "educational institution" for purposes of

an Iowa Code section 422.45(8) (1977) tax exemption as defined in 701 Iowa Administrative Code section 17.11 and *American College Testing Program.*

Hope is a church. As a natural consequence thereof, Hope provides religious instruction for such things as Sunday school, vacation Bible school and confirmation. Hope has no educational requirements which must be met by any of its instructors prior to instructing. The instructors make their own decisions about course material with apparently no established guidelines or set progressive curriculum for each year. In fact, the adult students choose their own material. Such a loose arrangement does not meet the standards of a 701 Iowa Administrative Code section 17.11 private nonprofit educational institution.

Since Hope did not meet its burden to show that it qualifies as a "private nonprofit educational institution" within the meaning of Iowa Code section 422.45(8) (1977), it is not entitled to an exemption under that section.

AFFIRMED.

BEFORE THE IOWA STATE DEPARTMENT OF REVENUE HOOVER STATE OFFICE BUILDING DES MOINES, IOWA

IN THE MATTER OF:	)	
HOPE EVANGELICAL LUTHERAN CHURCH 2736 Bowling Street SW Cedar Rapids, Iowa 52404	)	PROTEST Docket No. 84-14-6B-A
Consumer Use Tax Assessment	)	

1. The Notice of Assessment in this matter is dated December 19, 1983. The assessment is for consumer use tax for tax periods beginning October, 1978, through and including June, 1983. The amount in controversy as of December 19, 1983, is $762.31, which includes tax, interest and fees.

2. Iowa Code Section 422.45(1) exempts the gross receipts from sales of tangible personal property, services rendered, furnished or performed which the State is prohibited from taxing under the Constitution or laws of the United States or under the Constitution of the State of Iowa from the Iowa sales tax. If the sale of those items would be exempt from sales tax under Iowa Code Section 422.45(1), the use of those items would be exempt from Iowa's use tax under Iowa Code Section 423.4(4).

3. Hope Evangelical Lutheran Church (Taxpayer) protests the assessment of consumer use tax for all items purchased and described on the Iowa Department of Revenue use tax worksheets for the tax years in question for the reason that the assessment is unconstitutional under both the Constitution of the United States and the

Constitution of the State of Iowa. The State's attempt to tax the *use* of religious materials by a church has a chilling effect on the free exercise of religion, contrary to the First Amendment to the Constitution of the United States as applicable to the States under the Fourteenth Amendment and contrary to Section 3 of Article I of the Constitution of the State of Iowa. The State's attempt to tax the use of *written materials* would also have a chilling effect on freedom of the press guaranteed by Section 7 of Article I of the Constitution of the State of Iowa and the First and Fourteenth Amendments to the Constitution of the United States.

4. Iowa Code Section 423.4(4) provides that the use of tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by the terms of Iowa Code Section 422.45 (except subsection 4 and subsection 6), is specifically exempted from the Iowa use tax.

5. Iowa Code Section 422.45(3) provides that the gross receipts from the sale of educational, religious or charitable activities, where the entire proceeds therefrom are expended for educational, religious or charitable purposes, are exempt from Iowa sales tax and thus are exempt from Iowa use tax.

6. Taxpayer protests the assessment of consumer use tax for the following purchased items which were purchased from other church entities (educational, religious or charitable activities), and the entire proceeds therefrom were expended for educational, religious or charitable purposes by the church entities selling the same to Taxpayer. All purchases from:

(a) Fortress Church Supply Stores, a publishing house owned by the Lutheran Church in America.

(b) Augsburg Publishing House, owned by the American Lutheran Church.

(c) Concordia Publishing House, owned by the Missouri Synod Lutheran Church.

(d) The Lutheran magazine.

(e) The Lutheran Church in America.

7. Iowa Code Section 422.45(8) exempts the gross receipts of all sales of goods, wares, merchandise or services used for educational purposes to any private, non-profit educational institution in Iowa from Iowa's sales tax. Those items would also be exempt from Iowa's use tax under Iowa Code Section 423.4(4).

8. Taxpayer, in addition to being a church, is also a private non-profit educational institution.

9. Taxpayer protests the assessment of consumer use tax for the following purchased items which were used for educational purposes by Taxpayer:

(a) 1983 – W&W materials, publications, cards, supplies and books.

(b) 1982 – publications, subscriptions, supplies, vacation bible school, W&W material, books, cards, certificates and paper.

(c) 1981 – stencils, paper, cloth, supplies, books, certificates, publications, pins and record card.

(d) 1980 – publications, stencils, certificates, cards, records, books, roll kit and cradle roll.

(e) 1979 – publications, certificates, subscriptions, books, stencils, supplies and record cards.

(f) 1978 – publications.

10. Taxpayer requests that the Notice of Assessment dated December 19, 1983, be cancelled for the above stated reasons. In the alternative, Taxpayer requests that an informal hearing be set in this matter.

/s/ Gerald Lyell Fatka
GERALD LYELL FATKA

and

/s/ R.B. Willman
RANDALL B. WILLMAN
of
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ATTORNEYS FOR TAXPAYER

BEFORE THE IOWA STATE DEPARTMENT OF REVENUE AND FINANCE HOOVER STATE OFFICE BUILDING DES MOINES, IOWA

IN THE MATTER OF: HOPE EVANGELICAL LUTHERAN CHURCH 2736 Bowling Street S.W. Cedar Rapids, Iowa 52404 CONSUMER USE TAX ASSESSMENT	)	PROPOSED ORDER DOCKET NO. 84-14-6B-A

STATEMENT OF THE CASE

On January 18, 1984, Hope Evangelical Lutheran Church (Protestor) filed a protest to an assessment of consumer use tax for the tax periods October 1978 through June 1983. The assessment had been issued by the Iowa Department of Revenue and Finance (Department) on December 19, 1983. On June 13, 1986, the Department filed an answer. On July 10, 1986, the Hearing Officer issued a Notice of Time, Place and Nature of Hearing, scheduling an evidentiary hearing for February 3, 1987.

The following persons appeared at the evidentiary hearing on February 3, 1987: Gerald L. Fatka, attorney for the Protestor; David Young, pastor for the Protestor; Charles Schreiber, president of Protestor's congregation; Arlene Schreiber, treasurer of Protestor's congregation; Gerald Schmidt, past president of Protestor's congregation; Thomas Donahue, assistant attorney general for the Department; David Casey, manager of the Department's

Audit Services; and Elizabeth Beck, attorney in the Department's Appeals Section. The following persons testified: David Young, Arlene Schreiber, and David Casey.

The Protestor filed a brief on February 2, 1987. The Department filed its brief on April 22, 1987. The Protestor filed a reply brief on May 11, 1987.

The Department submitted corrections to the hearing transcript on April 15, 1987. The Protestor submitted corrections on February 8, 1988. The Hearing Officer listened to the hearing tapes, and the transcript has been corrected.

The issues in this case are as follows: (1) whether certain items are exempt from use tax pursuant to Iowa Code §§ 423.4(4) and 422.45(3) on the basis that the items were purchased from other church entities (educational, religious or charitable activities) and the entire proceeds therefrom were expended for educational, religious or charitable purposes by the church entities selling the same to Protestor; (2) whether certain items are exempt from use tax pursuant to Iowa Code §§ 423.4(4) and 422.45(8) on the basis that the items were used for educational purposes by a private, nonprofit educational institution (the Protestor); (3) whether the assessment is unconstitutional on the basis that a tax on the use of religious materials by a church has a chilling effect on the free exercise of religion contrary to the first and fourteenth amendments of the United States Constitution and § 3 of article I of the Iowa Constitution; and (4) whether the assessment is unconstitutional on the basis that a tax on the use of written materials has a chilling effect on the

freedom of the press guaranteed by the first and fourteenth amendments of the United States Constitution and § 7 of article I of the Iowa Constitution.

At the evidentiary hearing the Department objected to Protestor's Exhibits 1, 2 and 3 on the following grounds: the Department was denied the right of cross-examination, reasonably prudent persons would not rely on these affidavits for the conduct of their serious affairs, no foundation was established, and the Department was denied due process. The Department cited Department Rules 701 Iowa Admin. Code §§ 7.17(2)(c)(1) and (2)(g). The objections were overruled.

The following exhibits were admitted into the record:

PROTESTOR'S EXHIBITS

Exhibit 1 – Affidavit of Albert L. Haversat (1 pg.)
Exhibit 2 – Affidavit of Allen E. Meyer (1 pg.) and an attached Exemption from Missouri Sales and Use Tax (1 pg.)
Exhibit 3 – Affidavit of Donald M. Mattsson (1 pg.)
Exhibit 4 – Worksheets of Department auditor (18 pgs.)

DEPARTMENT'S EXHIBITS

Exhibit A – Letter of Findings by Department Tax Review Committee dated 4-23-86 (9 pgs.)
Exhibit B – Letter amending findings by Department Tax Review committee, dated 4-28-86 (2 pgs.), and an attached attorney general opinion, dated 3-24-86 (9 pgs.).

FINDINGS OF FACT

1. Hope Evangelical Lutheran Church (Protestor) is a Lutheran church located in Cedar Rapids, Iowa. The Protestor's congregation is 32 years old, and the Protestor has been located in its present building for 27 years. The Protestor has approximately 300 confirmed members. The Protestor is a nonprofit organization.

2. The Protestor's pastor has a master of divinity degree from the Lutheran School of Theology in Chicago, and he has been the Protestor's pastor for approximately 8½ years.

3. According to Protestor's pastor, Lutherans divide their work into five areas: worship, learning, witness, service, and support in the form of giving and time for all of these ministries.

4. The Protestor has the following activities: two worship services each week, Saturday nights and Sunday mornings; Sunday school on Sunday mornings; confirmation classes for 24 Wednesday nights each year; vacation Bible school in the summer for the children; a Word and Witness series for adults; and an adult forum which meets every Sunday. The Protestor's total average weekend attendance for worship services is approximately 108.

5. Approximately 30 to 40 children attend the Protestor's Sunday school. The Sunday school is taught by a staff of lay volunteer teachers. In 1987 the Protestor had a Sunday school teaching staff of eight and two superintendents. Vacation Bible school in the summer has a staff of

about 10 to 15. The Protestor's pastor teaches confirmation classes with two regular lay teachers and four part-time teachers.

6. The Protestor has a total of approximately 15 to 20 adult students. Word and Witness is a 55 session course for adults who meet every other week for two years. Half of the course is an in-depth study of the Bible, and the other half is an in-depth study of how to witness to the faith in daily life. The Protestor's pastor teaches this course. In 1987 there were five adults in the class. Another adult class is called Koinonia, a Greek word for fellowship, in which the adults study the Bible with the idea of coming closer together as people. The Protestor's pastor has taught one of these classes, and a lay person has taught another.

7. There are no educational requirements for the Protestor's teachers. The teachers are not required to be certified by the state. The teachers do not receive any pay from the Protestor.

8. All of the Protestor's programs involve some aspect of Christianity, either biblical, historical or ethical. The staff looks at various materials, decides what would be appropriate, and tells the superintendents. In the adult class the adults choose their own materials according to what they are interested in at the time.

9. The Protestor does not award any degrees. The Protestor does not have a parochial school.

10. During the years covered by the assessment there were three national Lutheran organizations which

in general were composed of local Lutheran congregations: the Lutheran Church in America (LCA), the American Lutheran Church (ALC), and the Lutheran Church Missouri Synod. The Protestor was affiliated with the LCA. Effective in 1988 the LCA and the ALC merged into one body.

11. During the assessment years the LCA's Office for Communications published The Lutheran, a magazine to which the Protestor subscribed. The magazine contained articles regarding devotion, church work, and church news in the world. The LCA's Board of Publication operated the Fortress Church publishing house in Philadelphia, Pennsylvania. The publishing house operated Fortress Church Supply Stores which were branch stores located throughout the country to provide easier access for local churches to buy supplies and books. Similar publishing houses existed in the ALC – the Augsburg Publishing House in Minneapolis, Minnesota; and in the Lutheran Church Missouri Synod – the Concordia Publishing House in St. Louis, Missouri.

12. The Protestor purchased materials from all three publishing houses. Some items were used in worship services, and other materials were used as course material for different programs.

13. In 1982 or 1983 a Department auditor conducted an audit of the Protestor's records for approximately 2½ days. The auditor requested the Protestor's bills beginning with the year 1977.

14. The auditor prepared worksheets for 1978 through 1983, listing items purchased by the Protestor, including items purchased out-of-state upon which no

sales tax or use tax was paid. Many of the items were purchased from Fortress Church Supply in Philadelphia, Pennsylvania. Some of the items from the various suppliers were as follows: publications, envelopes, home altars, candles, bulletins, certificates, candlelighter, lectionary, subscription to The Lutheran, Econo '79 mimeo, books, stencils, supplies, tapers, record cards, flower charts, cards, hood kits, coin collector, exam kit, paper, printing, one write forms, roll kit, cradle roll, crosses, hymnal companion, towel, W & W (Word & Witness) material, and cloth.

15. Other items were listed on the worksheets under the columns for Iowa purchases. Some of these items were as follows: paint, garbage bags, keys, battery, furnace filter, screws, anchors, belt, precleaner, and element.

16. On December 19, 1983, the Department issued a notice of assessment to the Protestor for consumer use tax for the tax period October 1978 through June 1983. The parties did not offer the assessment notice at the hearing. According to the protest and answer, the amount in controversy as of the date of the assessment was $762.31 which included tax, interest, and fees. According to a letter from the Protestor's attorney, dated December 5, 1983, the Department waived all penalties.

CONCLUSIONS OF LAW

The Department has jurisdiction of the parties and subject matter pursuant to Iowa Code §§ 17A.12, 423.16 and 422.54.

The issues in this case are as follows: (1) whether certain items are exempt from use tax pursuant to Iowa Code §§ 423.4(4) and 422.45(3) on the basis that the items were purchased from other church entities (educational, religious or charitable activities) and the entire proceeds therefrom were expended for educational, religious or charitable purposes by the church entities selling the same to Protestor; (2) whether certain items are exempt from use tax pursuant to Iowa Code §§ 423.4(4) and 422.45(8) on the basis that the items were used for educational purposes by a private, nonprofit educational institution (the Protestor); (3) whether the assessment is unconstitutional on the basis that a tax on the use of religious materials by a church has a chilling effect on the free exercise of religion contrary to the first and fourteenth amendments of the United States Constitution and § 3 of article I of the Iowa Constitution; and (4) whether the assessment is unconstitutional on the basis that a tax on the use of written materials has a chilling effect on the freedom of the press guaranteed by the first and fourteenth amendments of the United States Constitution and § 7 of article I of the Iowa Constitution.

Iowa Code ch. 423 sets forth the provisions regarding use tax in Iowa. An excise tax is imposed on the use in this state of tangible personal property purchased for use in this state at a percentage rate of the purchase price of the property. Iowa Code § 423.2. "Use" is defined as follows:

> "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include

> processing, or the sale of that property in the regular course of business.

Iowa Code § 423.1(1).

"Purchase" is "any transfer, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration." Iowa Code § 423.1(2). Exemptions from use tax are found at Iowa Code § 423.4.

If any person who causes tangible personal property to be brought into Iowa has already paid a tax in another state in respect to the sale or use of such property in an amount less than the Iowa use tax, the Iowa use tax is the difference between the Iowa percentage and the rate by which the previous tax was computed. If the tax imposed and paid in the other state is equal to or more than the Iowa use tax, then no tax is due in Iowa on the personal property. Iowa Code § 423.25.

It is incumbent upon a taxpayer contesting a Department action to show that the action was erroneous. *Richards v. Iowa Dept. of Revenue*, 360 N.W.2d 830, 831 (Iowa 1985); *City of Ames v. State Tax Comm'n*, 246 Iowa 1016, 1025, 71 N.W.2d 15, 21 (1955); *Dain Mfg. Co. v. Iowa State Tax Comm'n*, 237 Iowa 531, 533, 22 N.W.2d 786, 788 (1946). Exemption statutes must be strictly construed, and any doubts must be resolved against the exemption and in favor of taxation. The burden is on the one claiming exemption to clearly show its right thereto. *Iowa Movers & Warehousemen's Assoc. v. Briggs*, 237 N.W.2d 759, 769 (Iowa 1976); *American College Testing Program, Inc. v. Forst*, 182 N.W.2d, 826, 827 (Iowa 1970).

The first issue in this case is whether certain items are exempt from use tax pursuant to Iowa Code

§§ 423.4(4) and 422.45(3) on the basis that the items were purchased from other church entities (educational, religious, or charitable activities) and the entire proceeds therefrom were expended for educational, religious, or charitable purposes by the church entities selling the same to the Protestor.

Iowa Code § 423.4(4) provides an exemption from use tax for the use in Iowa of tangible personal property, the gross receipts from the sale of which are exempted from the retail sales tax by § 422.45 (except for certain subsections which are not applicable here). Iowa Code § 422.45(3) exempts from sales tax the gross receipts from sales of educational, religious, or charitable activities, where the entire proceeds therefrom are expended for educational, religious, or charitable purposes, except the gross receipts from games of skill, games of chance, raffles and bingo games as defined in chapter 99B.

Rules 701 Iowa Admin. Code §§ 17.1(1) and (2) set forth the criteria to evaluate whether activities are educational, religious, or charitable and whether the entire proceeds are expended for such purposes. For example in regard to expenditures, § 17.1(2) defines the test as whether all expenditures are so related to the activity so that the expenditure itself is for an educational, charitable, or religious purpose. The term "entire proceeds" is defined as those proceeds remaining after direct expenses have been deducted from the gross receipts derived from the activity or event. In addition the rule states that expenses should be necessary and have an immediate bearing or relationship to the fulfillment of the activity. Rule 701 Iowa Admin. Code § 17.1(2).

The Protestor contended that the major religious organizations which sell to the Protestor are nonprofit organizations engaged in educational, religious, or charitable activities, and their entire net proceeds are expended for educational, religious, or charitable purposes. As evidence in support of its position the Protestor presented the testimony of its pastor and three affidavits from officials with the major organizations.

The Department contended that the Protestor actually is litigating the validity of alleged tax exemptions of suppliers who would benefit from a favorable decision for the Protestor. The Department argued that the Protestor has failed to meet its burden of proof by offering self-serving affidavits and the testimony of a pastor who has no direct, personal knowledge. In its brief the Department also reiterated its objections to the admission of the affidavits.

The Protestor failed to meet its burden of proof to clearly establish its right to an exemption from use tax under Iowa Code §§ 423.4(4) and 422.45(3). The Protestor offered three affidavits which were admitted into the record. As noted by the Hearing Officer at the hearing, the objections to the exhibits would be considered in the weight given them. The three affidavits contained the following statements which are conclusions: they are not-for-profit organizations organized for educational, religious, or charitable activities and the entire net proceeds received are expended for educational, religious, or charitable purposes. There are no underlying facts in the affidavits or elsewhere in the hearing record to support these statements. The testimony of the pastor was inadequate to support the conclusions. The record does not show

how the affiants reached their conclusions. The Protestor did not present any of the national organizations' financial records to support the conclusions.

Under Iowa Code § 422.45(3) and rules 701 Iowa Admin. Code §§ 17.1(1) and (2) the Protestor must show the organizations' activities are educational, religious, or charitable, and that the entire proceeds are expended for such purposes. The evidence does not show how the affiants met these standards. Affidavits which merely state conclusions with no supporting documents or records cannot sustain the Protestor's burden. Nor can the Protestor shift the burden to the Department by submitting inadequate evidence at the hearing. It is noted that if in-person testimony was too expensive as stated by the Protestor, the Protestor could have explored possibilities of telephone depositions or obtaining the financial records for the Department's review.

In conclusion the Protestor failed to meet its burden of proof to show entitlement to an exemption from use tax under Iowa Code §§ 423.4(4) and 422.45(3).

The second issue in this case is whether certain items are exempt from use tax pursuant to Iowa Code §§ 423.4(4) and 422.45(8) on the basis that the items were used for educational purposes by a private, nonprofit educational institution.

As stated earlier Iowa Code § 423.4(4) generally incorporates the exemptions found at Iowa Code § 422.45. Iowa Code § 422.45(8) provides an exemption for the gross receipts of all sales of goods, wares, or merchandise, or services, used for educational purposes to any private nonprofit educational institution in Iowa. Rule

701 Iowa Admin. Code § 17.11 discusses various purchases such as sales of textbooks and yearbooks and school lunches. The rule also gives the following definition:

> A private nonprofit educational institution consists of a school, college, or university with students, faculty, and an established curriculum, a group of qualifying organizations acting in concert, or libraries.

See also *American College Testing Program, Inc. v. Forst*, 182 N.W.2d 826, 827 (Iowa 1970).

The Protestor contended that it meets the requirements of an educational institution because it has students, faculty, and an established curricula. The Department contended that the Protestor provides religious instruction as a normal consequence of being a religious organization, but this does not qualify the Protestor as an "educational institution".

The evidence did not establish that Protestor met the definition of "educational institution" as set forth in the rule and in *American College Testing*. The Protestor is a church. Part of its religious functions includes religious instruction such as Sunday school and confirmation. The Protestor does not have any educational requirements for any of its instructors. The instructors make their own decisions regarding course material with apparently no established guidelines or set, progressive curriculum for each year. The adult students choose their own material. Such a loose arrangement does not meet the requirement of an "educational institution consisting of a school, college, or university with students, faculty, and an established curriculum." See also *The Petition of East Des*

Moines Family Care Center, Inc., docket number 84-405-6A-DR, a Department declaratory ruling issued January 21, 1985.

Again taxation is the rule and exemption from taxation the exception. Exemption statutes must be strictly construed and any doubts must be resolved against the exemption and in favor of taxation. *American College Testing* at 827. Strict construction does not allow "educational institution" to be extended to include the Protestor. The legislature has not extended this exemption to "religious institutions."

In conclusion the Protestor failed to show entitlement to an exemption from use tax under Iowa Code §§ 423.4(4) and 422.45(8). In its brief the Protestor challenged the validity of rule 701 Iowa Admin. Code § 17.11. This issue was not properly raised prior to the hearing and will not be considered.

In the third and fourth issues the Protestor contended that the entire assessment was unconstitutional and argued that the statute is unconstitutional as applied. The third issue is whether the assessment is unconstitutional on the basis that a tax on the use of religious material by a church has a chilling effect on the free exercise of religion contrary to the first and fourteenth amendments of the United States Constitution and § 3 of article I of the Iowa Constitution. The fourth issue is whether the assessment is unconstitutional on the basis that a tax on the use of written material has a chilling effect on the freedom of the press guaranteed by the first and fourteenth amendments of the United States Constitution and § 7 of article I of the Iowa Constitution.

The first amendment to the United States Constitution provides, in part, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. Iowa Const. art. I, § 3 contains the same language regarding religion. Iowa Const. art. I, § 7 provides that no law shall be passed to restrain or abridge the liberty of speech, or of the press.

A constitutional challenge must specify the provisions invoked and state with particularity the details of any claimed transgression. *McSpadden v. Big Ben Coal Co.*, 288 N.W.2d 181, 184 (Iowa 1980). All presumptions are in favor of the constitutionality of a regularly enacted statute. *Moorman Mfg. Co. v. Bair*, 254 N.W.2d 737, 743 (Iowa 1977). One who attacks a statute on constitutional grounds has a heavy burden to demonstrate beyond a reasonable doubt that the act violates the constitutional provisions. To sustain this burden one must negate every reasonable basis which may support the statute. *Moorman* at 743; *Richards v. City of Muscatine*, 237 N.W.2d 48, 57 (Iowa 1975).

The Protestor argued that attempting to tax the use of religious and written materials has a chilling effect on the free exercise of religion and freedom of the press. The Protestor cited the following cases for the principle that under the freedom of religion clause a revenue tax may not be imposed on the privilege of exercising religious freedom: *Jones v. Opelika*, 319 U.S. 103 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Busey v. District of Columbia*, 319 U.S. 579 (1943); *Follett v. McCormick*, 321 U.S. 573 (1944). The Protestor did not cite any cases regarding its freedom of the press argument.

The Department cited *Walz v. Tax Commission*, 397 U.S. 664 (1970) for a historical review of tax exemption statutes regarding the religious clause of the first amendment. The Department argued that without specific exemptions for religion, taxes can be imposed.

The Protestor's arguments are not persuasive. The cases cited by the Protestor involved direct licensing or solicitation fees upon Jehovah's Witnesses who practiced their religion door to door. The use tax in this case is not a tax on the worship service itself; it is not a tax on the pastor in the pulpit; and it is not a tax on religious beliefs. An indirect economic burden does not necessarily rise to a constitutionally impermissible infringement. The Protestor has not critically scrutinized the tests regarding the "free exercise clause" and the "establishment clause". See, for example, *U.S. v. Lee*, 455 U.S. 252 (1982); *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Love Church v. City of Evanston*, 671 F.Supp. 508 (N.D. Ill. 1987); *Nally v. Grace Com. Church of the Valley*, 240 Cal. Rptr. 215 (Cal. App. 2 Dist. 1987).

The Protestor did not meet its burden to show that the assessment was unconstitutional on the bases that the use tax has chilling effects on the free exercise of religion and the freedom of the press.

In conclusion the Protestor failed to establish any exemption to the consumer use tax imposed by the Department. The assessment is affirmed.

No affidavit has been filed by the Protestor under rule 701 Iowa Admin. Code § 7.9, seeking the deletion of identifying details in this case, if any.

Pursuant to Iowa Code § 17A.15(3) (1987), this Proposed Order becomes the final order of the Iowa Department of Revenue and Finance without further proceedings unless there is an appeal to, or review on motion of, the Department within thirty (30) days of the issuance of this Proposed Order.

Issued at Des Moines, Iowa this 31st day of May, 1988.

IOWA DEPARTMENT OF REVENUE AND FINANCE

BY /s/ Linda Erickson
Linda Erickson
Hearing Officer

BEFORE THE IOWA STATE DEPARTMENT
OF REVENUE AND FINANCE
HOOVER STATE OFFICE BUILDING
DES MOINES, IOWA

IN THE MATTER OF	*	ORDER OF DIRECTOR UPON
HOPE EVANGELICAL LUTHERAN CHURCH 2736 Bowling Street S.W. Cedar Rapids, Iowa 52404	*	REVIEW OF HEARING OFFICER'S PROPOSED ORDER
CONSUMER USE TAX ASSESSMENT	*	DOCKET NO. 84-14-6B-A
	*	

On June 20, 1988, the Protestor, Hope Evangelical Lutheran Church, filed an appeal to the Director of the Iowa Department of Revenue and Finance (Director), requesting a review of the Hearing Officer's Proposed Order issued May 31, 1988. On June 30, 1988, the Director issued a Notice of Director's Review of Hearing Officer's Proposed Decision, setting a review date of August 2, 1988. The Director, having examined the record developed by the parties, hereby issues this Order.

STATEMENT OF THE CASE

The Director hereby adopts and fully incorporates into this Order the Statement of the Case as set forth in the Hearing Officer's Proposed Order.

FINDINGS OF FACT

The Director hereby adopts and fully incorporates into this Order the Findings of Fact as set forth in the Hearing Officer's Proposed Order.

CONCLUSIONS OF LAW

The Director hereby adopts and fully incorporates into this Order the Conclusions of Law as set forth in the Hearing Officer's Proposed Order.

IT IS THEREFORE ORDERED that the Hearing Officer's Proposed Order issued May 31, 1988, is adopted in its entirety. The Protestor failed to meet its burden of proof on the issues raised. The assessment is affirmed.

No affidavit has been filed by the Protestor under rule 701 Iowa Admin. Code § 7.9, justifying deletion of any information contained in the record prior to public inspection.

This Director's decision is the final Order of the Iowa Department of Revenue and Finance.

Issued at Des Moines, Iowa, this 31st day of August, 1988.

IOWA DEPARTMENT OF REVENUE
AND FINANCE

BY /s/ G. D. Bair
G. D. Bair
Director

IN THE IOWA DISTRICT COURT,
IN AND FOR LINN COUNTY

Upon the Petition of HOPE EVANGELICAL LUTHERAN CHURCH, Petitioner, And Concerning THE IOWA DEPARTMENT OF REVENUE AND FINANCE, Respondent.	)	No. LA 17062
	)	RULING ON PETITION FOR JUDICIAL REVIEW
	)	(Filed August 3, 1989)

This matter is before the court on the September 21, 1988 petition for judicial review filed by Hope Evangelical Lutheran Church ("petitioner"). Oral arguments were heard before the undersigned on May 4, 1989. Attorney Gerald Lyell Fatka represented petitioner. Assistant Attorney General Lucille Hardy represented the Iowa Department of Revenue and Finance ("respondent"). Each party submitted a brief. Having considered the record and arguments of counsel, the court enters the following ruling.

STATEMENT OF THE CASE

Petitioner was assessed a consumer use tax, for October 1978 through June 1983, on consumer items purchased from out-of-state, church-affiliated suppliers. At the time of the assessment, the amount in controversy was $762.31, including interest and fees. Petitioner filed a protest with respondent. By order dated August 31, 1988, the respondent's director adopted the hearing officer's proposed order, which affirmed the assessment.

Petitioner argues that the assessment is unconstitutional because an excise tax on the use of religious materials by a church has a chilling effect on the free exercise of religion, and because an excise tax on the use of written materials has a chilling effect on the freedom of the press.

Petitioner alleges that it is a private, nonprofit educational institution and that the items assessed are exempt from use tax because the items were used for educational purposes. Finally, petitioner alleges that the church entities selling the assessed items to petitioner expend the entire proceeds from those items for educational, religious, or charitable purposes, and therefore, that those items are exempt from use tax.

STANDARD OF REVIEW

Review of agency action is at law, not de novo. *Iowa Health Systems Agency, Inc. v. Wade*, 327 N.W.2d 732, 733 (Iowa 1982). The court shall reverse, modify, or grant other appropriate relief if substantial rights of the petitioner have been prejudiced because the agency action is, *inter alia*, in violation of constitutional provisions, or unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. Iowa Code § 17A.19(8) (1989); *see also Gipson v. Iowa Dept. of Job Service*, 315 N.W.2d 834, 836 (Iowa App. 1981) (the district court's review is limited to a determination of whether the agency committed any errors of law specified in Iowa Code § 17A.19(8)).

Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Elliot v.*

Iowa Dept. of Transp., 377 N.W.2d 250, 256 (Iowa App. 1985). An agency's findings are conclusive when facts are disputed or when reasonable minds may differ on the inferences to be drawn from the evidence. *Id.* It is the function of the agency, as trier of fact, to determine what part of the testimony at the hearing to accept or reject; the credibility determination should not be overturned on review unless the court can say that the hearing examiner erred. *Id.*

The possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's finding from being supported by substantial evidence. *City of Davenport v. Pub. Emp. Rel. Bd.*, 264 N.W.2d 307, 311 (Iowa 1978). The question is not whether there is sufficient evidence to warrant a decision the agency did not make, but rather whether there is substantial evidence to warrant the decision it did make. *Peoples Memorial Hosp. v. Iowa Civil Rights*, 322 N.W.2d 87, 91 (Iowa 1982).

CONCLUSIONS OF LAW

A taxpayer has the burden of proving that an assessment by the Iowa Department of Revenue was erroneous. *Richards v. Iowa Dept. of Revenue*, 360 N.W.2d 830, 831 (Iowa 1985). A taxing statute will not be declared unconstitutional unless it is so clearly and plainly in contravention of the constitutional limitations and its guarantees as to leave no reasonable doubt as to its unconstitutionality. *See Vilas v. Iowa State Board of Assessment and Review*, 223 Iowa 604, 607, 273 N.W. 338, 339-40, *appeal dismissed*, 58 S.

Ct. 38 (1937). All presumptions are in favor of the constitutionality of a taxing statute. *See City of Waterloo v. Selden*, 251 N.W.2d 506, 508 (Iowa 1977).

Iowa's use tax is an excise tax imposed on the use of tangible personal property. Iowa Code § 423.2 (1989). Churches are not exempt from taxes on property used in connection with religious activities. *See Murdock v. Commonwealth of Pennsylvania*, 63 S. Ct. 870, 874 (1943) (dictum). The Alabama Supreme Court has upheld a use tax on churches. *State v. Toolen*, 167 So.2d 546, 551-52 (Ala. 1964).

The cases cited by petitioner on the free exercise issue are not controlling. In *Jones v. City of Opelika*, 63 S. Ct. 890 (1943), and *Murdock*, 63 S. Ct. at 877, a flat license tax imposed on itinerant peddlers of religious books was held to be an unconstitutional restriction on the free exercise of religion. In *Follett v. Town of McCormick, S.C.*, 64 S. Ct. 717 (1944), a flat license tax as applied to a home town evangelist was also held to be unconstitutional. The license tax in *Murdock* was found to be "quite different" from a tax on property used in connection with religious activities. *Murdock*, 63 S. Ct. at 874. And a preacher's exemption from a license tax does not mean that the preacher is free from property taxes. *Follett*, 64 S. Ct. at 719.

Similarly, the case of *State v. Van Daalan*, 11 N.W.2d 523 (S.D. 1943), cited by petitioner, is distinguishable from the instant case. Quoting liberally from *Murdock*, the South Dakota Supreme Court held that the state's two percent occupation tax was an unconstitutional restriction on the free exercise of religion when applied to

Jehovah's Witnesses selling and giving away religious pamphlets and books. *Van Daalan*, 11 N.W.2d at 527. In the instant case, petitioner failed to prove that the assessment of the use tax is unconstitutional pursuant to the free exercise clause.

In its brief, petitioner cites various establishment clause cases, *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971); *Walz v. Tax Commission of City of New York*, 90 S. Ct. 1409 (1970); *Texas Monthly, Inc. v. Bullock*, 109 S. Ct. 890 (1989). Petitioner did not argue excessive governmental entanglement with religion before the agency. Since there is no establishment clause evidence in the record made before the agency, the court is precluded from considering that evidence now. *Cf. J. Swaggart Ministries v. Bd. of Equal.*, 250 Cal. Rptr. 891, 905 (Cal. Ct. App. 1988) (issues not raised in claim for tax refund may not be raised in suit for refund).

Petitioner is not a publisher and appears to lack standing to litigate whether Iowa's use tax as applied to churches violates freedom of the press. The court assumes, *arguendo*, that petitioner has such standing. Nonetheless, taxation of publications is constitutional if the press is not singled out for special treatment. *See Minneapolis Star & Tribune v. Minn. Com'r of Rev.*, 103 S. Ct. 1365, 1369 (1983). Petitioner does not allege discrimination, but argues for an exemption based on content. Such an exemption would be repugnant to the first amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 107 S. Ct. 1722, 1727 (1987).

There is no authority in the Iowa Code to grant a nonprofit corporation any type of blanket use tax

exemption on its purchases simply because the organization is exempted from federal or state income taxes. 701 Iowa Admin. Code § 17.1(4)(a). Except for private nonprofit educational institutions, Iowa Code § 422.45(8), all nonprofit organizations are required to pay Iowa use tax on their purchases. 701 Iowa Admin. Code § 17.1(4)(c). Purchases that are not for resale by educational, religious, or charitable organizations cannot be made free of sales tax. *Id.* at § 17.1(3).

Administrative rules have the force of law and are presumed valid. *Richards v. Iowa Dept. of Revenue*, 360 N.W.2d 830, 833 (Iowa 1985). Exemption statutes must be strictly construed and any doubts must be resolved against the exemption and in favor of taxation. *American College Testing Program, Inc. v. Forst*, 182 N.W.2d 826, 827 (Iowa 1970).

Tangible personal property used for educational purposes by a private Iowa nonprofit educational institution is exempt from use tax. *See* Iowa Code §§ 422.45(8), 423.4(4) (1989). A private nonprofit educational institution consists, *inter alia*, of a school, college, or university with students, faculty, and an established curriculum. *American College*, 182 N.W.2d at 827; 701 Iowa Admin. Code § 17.11.

Petitioner cites *Community Drama Ass'n v. Iowa State Tax Com'n*, 109 N.W.2d 23, 28 (Iowa 1961), for the proposition that many jurisdictions have accepted a broad meaning of the word "educational." In *Community Drama*, the Iowa Supreme Court held that the community theater was engaged in educational activities, which were

exempt from sales tax. *Id.* But the Court noted that determining what are "educational activities" is a factual problem not amenable to an all-inclusive rule. *Id.*

Petitioner's activities in the instant case are very different from those of the theater in *Community Drama.* There, the theater offered activities comparable to those sponsored by colleges. *Id.* The participants were directed by professional instructors. *Id.* The children's classes included regular classroom work and speech therapy. *Id.* at 24. The adult education classes were cosponsored by the Des Moines Public Schools. *Id.* at 25.

Tangible personal property is exempt from Iowa use tax where the entire proceeds from sales of educational, religious, or charitable activities are expended for educational, religious, or charitable purposes. *See* Iowa Code §§ 422.45(3), 423.4(4) (1989). The Iowa Administrative Code enumerates criteria to evaluate whether activities are educational, religious, or charitable, 701 Iowa Admin. Code § 17.1(1)(a)-(c), and whether the entire proceeds are expended for such purposes. *Id.* at § 17.1(2).

Petitioner entered three affidavits into the record in an attempt to prove that petitioner's suppliers are nonprofit organizations engaged in educational, religious, or charitable activities, and that their entire net proceeds are expended for educational, religious, or charitable purposes. The affidavits contain no underlying facts to support the conclusions contained therein. Therefore, the affidavits were of little probative value.

Petitioner's contention that it made out a prima facie case for entitlement to the exemption is not supported by the record made before the agency. Petitioner cannot shift

its burden of proof to respondent by submitting inadequate evidence. Petitioner cites no authority for its assertion that respondent has an obligation to investigate petitioner's protest and to present evidence contradictory to respondent's position to the hearing officer. Rather, the burden is on petitioner to show that respondent's assessment is erroneous. *Richards*, 360 N.W.2d at 831. Substantial evidence in the record supports respondent's determination that petitioner does not meet the definition of educational institution.

RULING

IT IS, THEREFORE, ORDERED that the August 31, 1988 decision by G. D. Bair, respondent's director, is AFFIRMED.

Costs shall be assessed to petitioner.

Clerk shall notify counsel of record.

Dated this 3rd day of August 1989.

/s/ Thomas M. Horan
Thomas M. Horan, Judge
Sixth Judicial District of Iowa

(2)

No. 90-1317

FILED
MAR 20 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

HOPE EVANGELICAL LUTHERAN CHURCH,

Petitioner,

v.

IOWA DEPARTMENT OF REVENUE AND FINANCE,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Iowa

RESPONDENT'S BRIEF IN OPPOSITION

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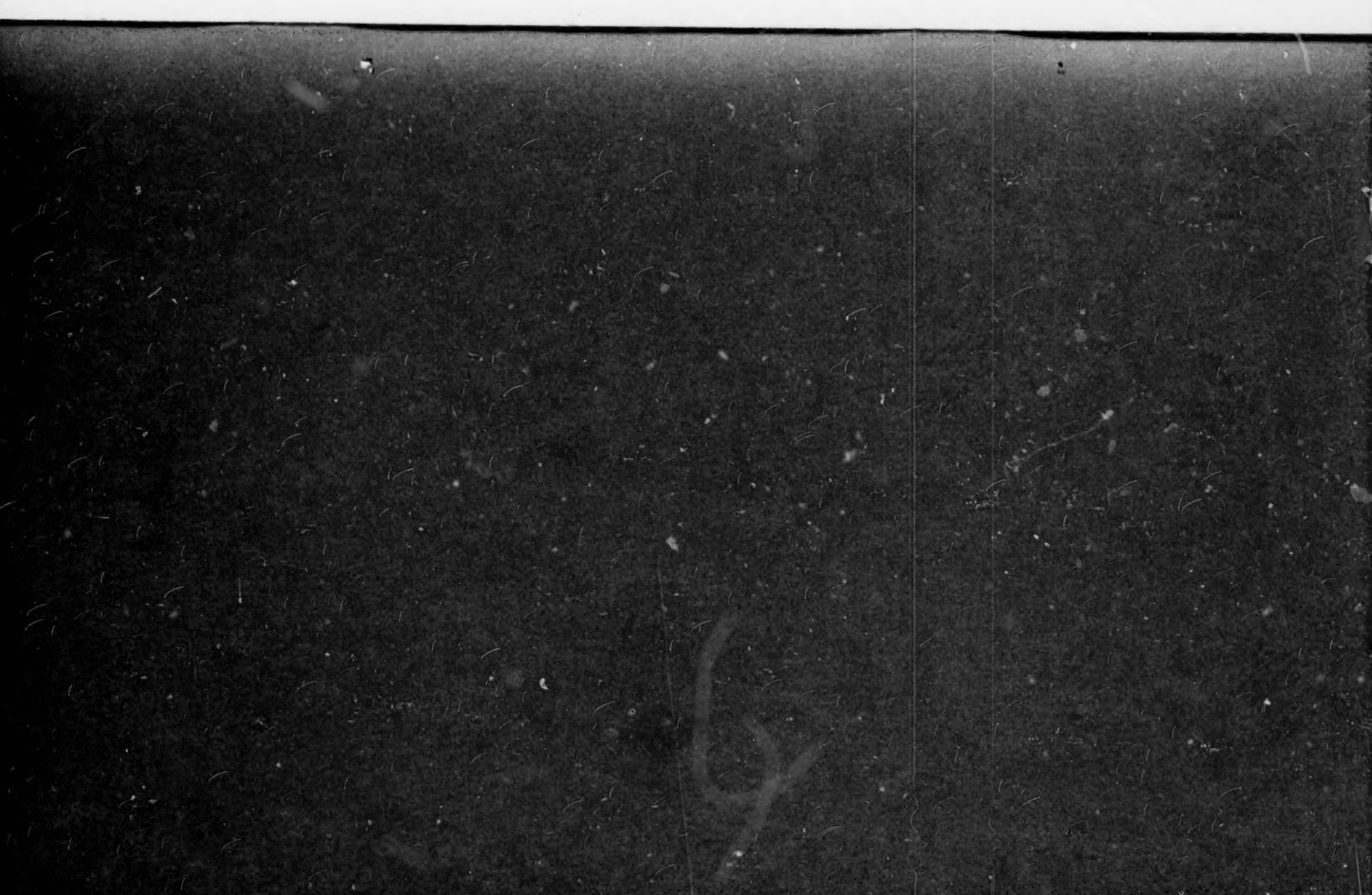

QUESTIONS PRESENTED FOR REVIEW

1. Does the Free Exercise Clause of the First Amendment to the U.S. Constitution require Iowa to grant churches an exemption, from its generally applicable sales and use tax scheme of excise taxation, for all tangible personal property which is religious in nature and may at some point in time be used or consumed in the conduct of religious services?

2. Does the Freedom of the Press Clause of the First Amendment to the U.S. Constitution require Iowa to exempt, from its generally applicable sales and use tax scheme of excise taxation, all "uses" of written materials by a church?

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1. Petitioner has identified no special or important reasons why a petition for writ of certiorari should be granted in this case pursuant to Supreme Court rule 10 5

2. The Iowa Supreme Court's decision as to the free exercise clause issue is consistent with prior precedence and no unsettled important questions of federal law have been presented by Petitioner 7

3. The Iowa Supreme Court's decision as to the Freedom of the Press Clause issue is consistent with prior precedence and no unsettled important questions of federal law have been presented by Petitioner 9

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CONSTITUTIONAL PROVISIONS AND STATUTES

The Iowa Department of Revenue and Finance (hereinafter the "Department") agrees with Petitioner's statement of the constitutional provisions and statutes applicable to the present case with two very important exceptions. First, although Petitioner cited in its Petition on page 1 to the Establishment Clause, the Free Exercise Clause, the Free Speech Clause and the Freedom of the Press Clause of the First Amendment to the United States Constitution, it is important to note that the only issues properly before this Court are those implicating the Free Exercise Clause and the Freedom of the Press Clause since these were the only issues specifically raised, developed and considered at the administrative level. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 700 (1990); *Hope Evangelical Lutheran Church v. Iowa Department of Revenue and Finance*, 463 N.W.2d 76, 82 (Iowa 1990); *Kartridg Pak Co. v. Department of Revenue*, 362 N.W.2d 557, 561 (Iowa 1985).

Secondly, one critical Iowa statute was neither cited nor quoted by Petitioner. That statute is Iowa Code § 423.1(1) which defines the term "use", within the context of Iowa's excise use tax, in pertinent part as follows:

> "Use" means and includes *the exercise* by any person *of any right or power* over tangible personal property incident to the ownership of that property . . . .

(Emphasis added).

STATEMENT OF THE CASE

Petitioner's Statement of the Case is accepted by the Department as substantially correct. The following important facts were, however, omitted and the nature of and legal incidence of Iowa's use tax was mischaracterized as explained below.

The present case involves an Iowa excise tax assessed on the "use" in Iowa of certain items purchased by the Hope Evangelical Lutheran Church which is located in Cedar Rapids, Iowa (hereinafter "Hope"). All items were purchased by Hope from out-of-state suppliers. It was undisputed that the items involved were shipped to Hope and accepted by Hope in Iowa. In this case, Hope's sole argument is that its "use" in Iowa of certain of these items cannot be subjected to taxation because the items are religious in nature.

The original assessment involved taxes on the "use" in Iowa of the following consumer items: oven, garbage bags, adhesive, lights, books, furnace filters, cleaners, supplies, salt, candles, wire, paint primer, paint supplies, battery, folding partition, cards, bulletins, towels, certificates, paper, cloth, publications, envelopes, home altars, credit memos, subscriptions, candle lighter, stencils, book tapers, flower chart card, hood kit, coin collection, exam kit, forms, printing, roll kit, cradle roll, crosses, anniversary directories, lawn mower, pins, hymnal companion, word and witnesses materials and similar items. Hope argues that, of the items listed above, the state of Iowa must exempt, from its generally applicable excise tax, all of those items which it claims are of a religious nature

and which may, at some point in time after their purchase, be used or consumed in a religious practice.

Hope's characterization of Iowa's use tax as a tax imposed on its use of the disputed articles "in its religious services" is both factually and legally incorrect. Iowa's four percent sales tax, as are most such taxes in the Nation, is a generally applicable retail sales tax whereby gross receipts from retail sales of tangible personal property are taxed. In addition, in order to reach those retail sales that cannot be subjected to state sales tax, Iowa (as is the case in most states which impose sales taxes) also imposes a complimentary generally applicable four percent retail use tax whereby the use in Iowa of all tangible personal property is taxed. *Dain Mfg. of Iowa v. Iowa State Tax Commission*, 237 Iowa 531, 22 N.W.2d 786 (1946). One major purpose of the Iowa use tax is to prevent evasion of payment of the Iowa sales tax by the purchase of goods from outside the state. *People's Gas & Elec. Co. v. State Tax Com'n*, 28 N.W.2d 799, 802 (Iowa 1947).

As a matter of law, the incidence of Iowa's use tax is on the consumer and attaches to such property at the moment when it is purchased for use in and then actually comes to rest in the state. *City of Ames v. State Tax Com'n.*, 71 N.W.2d 15, 20-21 (Iowa 1955). In fact, the Iowa legislature specifically defined "use" for purposes of this statute as broadly as possible, in order to effect its purpose, and it includes "the exercise by any person of *any right or power over* tangible personal property incident to the ownership of that property." Iowa Code § 423.1 (1). This would, of course, cover such non-religious "uses" as acceptance, removal of packaging, retention, storage, and

distribution of all tangible personal property including bibles, candles, garbage bags, etc., all of which occur prior to any other secondary "use" such as the actual "consumption" of any item in "worship." Thus, Iowa's "use" tax attaches and would be due long before any of the disputed items involved could have been employed in any religious activity. It is this prior "use" which was taxed in the present case and which occurred long before any of the articles taxed could have been employed in any act of "worship."

The same is true of Iowa's use tax as it applies to bibles, other books and other written materials. The reading of these items is ***not*** the "use" which subjects their purchase to the tax, it is merely one possible subsequent "use." The initial acceptance, removal of packaging, storage, display, and distribution are all prior "uses" which trigger the tax before any written materials would or could be read. Iowa's tax is imposed totally independent from any religious "use" of tangible personal property.

SUMMARY OF THE ARGUMENT

Hope has cited no authority which is in conflict with the Iowa Supreme Court's decision in the present case. Further, the two United States Supreme Court cases cited and relied upon by Hope, *Follett v. McCormick*, 321 U.S. 573 (1944) and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) have already been distinguished by this Court in *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688. Finally, the *Jimmy Swaggart Ministries* case, *Texas Monthly Inc. v. Bullock*, 109 S.Ct. 890 (1989);

Hernandez v. Commissioner, 109 S.Ct. 2136 (1989); and *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) are all directly on point and dispositive of each and every issue presently argued by Hope. Thus, since no basis for the grant of certiorari has been presented, certiorari should be denied.

REASONS TO DENY THE PETITION

I. PETITIONER HAS IDENTIFIED NO SPECIAL OR IMPORTANT REASONS WHY A PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED IN THIS CASE PURSUANT TO SUPREME COURT RULE 10.

Hope has cited only three cases to this Court, all of which are United States Supreme Court cases. Hope has cited no conflicting decisions by other state courts of last resort on any of the issues presently presented. (Table of Authorities, Petition for Writ of Certiorari, p. iii.) Further, no conflicting federal district court or United States Courts of Appeal cases have been cited by Hope. *Id.*

Of the three Supreme Court cases cited, two of those cases, *Follett v. McCormick*, 321 U.S. 573 and *Murdock v. Pennsylvania*, 319 U.S. 105, dealt specifically with direct flat regulatory licensing or solicitation fees upon Jehovah's Witnesses who, as a part of their religious practices, proselytized door-to-door. This Court very recently addressed Hope's present arguments as to the appropriate application of those cases. This Court ruled specifically that the flat fee occupational taxes involved in those two cases are quite different from excise taxes placed on the purchase and/or use of personal property

by churches or ministers and ruled that because the taxes involved in those two cases were substantively different in nature, those two cases were clearly distinguishable from and do not apply to or control in a sales or use tax challenge. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688. *Accord, Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890; *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943). *See also, Alabama v. Toolen*, 167 So. 2d 546 (Ala. 1964); *State v. Van Daalan*, 11 N.W.2d 523, 525 (S.D. 1943) (the court limited and distinguished its own ruling in that case from one in which a tax is placed on property used or employed in connection with religious activities citing *Murdock*). Thus, two of the three cases cited by Hope have already been specifically distinguished by this Court and the Court has ruled that they do not apply to the types of taxes involved in the present case. Quite simply, Hope's arguments based on these two cases have already been made by others and were unequivocally rejected by this Court. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688.

Finally, in the third and final case cited by Hope which is directly on point, the *Jimmy Swaggart Ministries* case, no Free Exercise Clause or Freedom of the Press Clause violations were found. The Iowa Supreme Court's decision in the present case is in full accord with the ruling in the *Jimmy Swaggart Ministries* case. Thus, since Hope has cited absolutely no applicable authority which supports its position and no authority from other jurisdictions in conflict with the Iowa Supreme Court's decision in this case, no important reasons for a grant of certiorari have been stated. Certiorari should be denied.

II. THE IOWA SUPREME COURT'S DECISION AS TO THE FREE EXERCISE CLAUSE ISSUE IS CONSISTENT WITH PRIOR PRECEDENCE AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONER.

It is axiomatic that churches and other religious institutions have ***not*** historically enjoyed any inherent constitutional blanket exemption from excise taxes placed on the personal property which they themselves purchase except so far as they may be specifically exempted by statutory enactment. *Walz v. Tax Commission*, 397 U.S. 664 (1970). This Court indicated long ago that these organizations must bear their fair share of this type of tax burden, absent a specific statutory exemption. *Murdock v. Pennsylvania*, 319 U.S. 105, 109; *Hernandez v. Commissioner*, 109 S.Ct. 2136. This view was, only a few months ago, revisited and reaffirmed by this Court in the *Jimmy Swaggart Ministries* case.

The present case is directly on point with and controlled by the *Jimmy Swaggart Ministries* case and Hope's attempt to distinguish the Iowa tax at issue is without merit. Although Hope indicates otherwise, California's sales and use taxes were ***both*** challenged in the *Jimmy Swaggart Ministries* case and were upheld. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 697. Further, Iowa's use tax is not distinguishable from the California use tax challenged and upheld in that case. California's use tax was imposed upon the purchaser whether or not the purchaser was a religious organization. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 691. The same is true of Iowa's

use tax. Iowa Code § 423.2 (1991). Both are generally collected by the retailer at the time the sale is made. This Court specifically ruled that these types of taxes, which apply to all sales and uses of tangible personal property in the state no matter who the purchasers are, do not act as an impermissible precondition or prior restraint on religious freedoms. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694-697. Further, this Court has also recognized that a mere decrease in the amounts of money available to religious institutions to spend on their religious activities is not a constitutionally significant burden. *Id.* It is also well settled that generally applicable administrative and record keeping burdens including the attendant audit procedures may be constitutionally imposed on religious organizations. *Id.* at 698.

Finally, as a matter of law, an exemption based ***solely*** on the religious nature, content, or use of the tangible personal property purchased or the status of the purchaser as a religious institution, which Hope argues is required in this case by the Free Exercise Clause, would clearly violate the Establishment Clause of the First Amendment to the U.S. Constitution. *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890. Thus, since no real factual distinctions have been presented and no unsettled and important federal questions have been raised by Hope, it is clear that the *Jimmy Swaggart Ministries* and *Texas Monthly* decisions control in the present case and certiorari should not be granted.

III. THE IOWA SUPREME COURT'S DECISION AS TO THE FREEDOM OF THE PRESS CLAUSE ISSUE IS CONSISTENT WITH PRIOR PRECEDENCE AND NO UNSETTLED IMPORTANT QUESTIONS OF FEDERAL LAW HAVE BEEN PRESENTED BY PETITIONER.

Hope simply alleges it has a constitutional entitlement, grounded in the Freedom of the Press Clause of the U.S. Constitution, to an exemption from Iowa's generally applicable excise tax for all written materials it purchases from outside the state based solely on its status as a religious institution and the religious nature and content of the materials. No case law has *ever* been cited by Hope to support this claim. It is, in fact, now well settled that no such entitlement to an exemption exists, *Jimmy Swaggart Ministries v. Board of Equalization of California*, 110 S.Ct. 688, 694-696, and, additionally, any exemption for written religious materials based solely on their religious content would actually be repugnant to the First Amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221; *Minneapolis Star & Tribune v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Therefore, certiorari as to this issue should be denied.

CONCLUSION

For all of the above-stated reasons, the Department respectfully requests that Hope's Petition for Writ of Certiorari be denied.

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